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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF NEVADA

10

11 UNITED STATES OF AMERICA,) 3:13-cr-108-MMD-VPC
12 Plaintiff,)
13 v.)
14 VAN McDUFFY,)
also known as Van McDuffie)
15 Defendant.)
16

**Proposed Joint Motion To Designate Case
As Complex With Points & Authorities
Together With Joint Proposed Complex
Case Schedule Pursuant To Local Court
Rule 16-1(a)**

17

JOINT MOTION UNDER LCR 16-1(A)

18 Defendant Van McDuffy, by his attorney of record, Michael J. Kennedy, Chief Assistant
19 Federal Defender, and the United States, by its attorney of record, Megan Rachow, Assistant United
20 States Attorney, move this court, based upon good cause shown, to designate this case as complex.
21 Local Court Rule 16-1(a) provides that “[a]t any time after arraignment, the Court on its own motion
22 or upon motion by any party, and for good cause shown, may designate a case as complex.” LCR 16-
23 1(a)(1). During the October 31, 2013 arraignment and plea hearing, the parties informed the court
24 that they would be filing a joint complex case schedule pursuant to Local Rule 16-1, because both
25 parties sought designation of the case as complex. *C.R. 14, 10/31/2013 A&P minutes.* Based upon
26 good cause shown below, the parties jointly request that this Court designate the case as complex
27 and issue an order granting the proposed complex case schedule.

28

POINTS & AUTHORITIES

2 On October 30, 2013, after Van McDuffy's initial appearance on a criminal complaint (*see*
3 *C.R. 1 (criminal complaint) & C.R. 8 (10/17/2013 minutes of initial appearance)*), a federal grand
4 jury returned a two count indictment against Van McDuffy. *C.R. 11, indictment.* Count One charges
5 Defendant Van McDuffy with bank robbery with a dangerous weapon resulting in death in violation
6 of Title 18 United States Code Section 2113(a), 2113(d) and 2113(e). *C.R. 11 at 1:15-1:24.* Title
7 18 United States Code Section 2113(e) provides that “[w]hoever, in committing any offense defined
8 in this section ... kills any person ... if death results shall be punished by death or life imprisonment.”
9 18 U.S.C. § 2113(e). Count two charges Defendant Van McDuffy with use of a firearm during and
10 in relation to a crime of violence causing death in violation of Title 18 United States Code Sections
11 924(c)(1) and 924(j)(1). *C.R. 11 at 2:01-2:09.* Title 18 United States Code Section 924(j)(1)
12 provides that “[a] person who, in the course of a violation of subsection (c), causes the death of a
13 person through the use of a firearm, shall—if the killing is a murder (as defined in section 1111), be
14 punished by death or by imprisonment for any term of years” 18 U.S.C. § 924(j)(1). On October
15 31, 2013, Defendant Van McDuffy entered his not guilty plea to both counts. *C.R. 14, 10/31/2013*
16 *A&P minutes.*

17 The potential of punishment by death makes Van McDuffy's case complex, both legally and
18 factually. See 18 U.S.C. § 3005 (statutory right to 2 counsel, with at least 1 learned in the law
19 applicable to capital cases ... in assigning counsel, the court shall consider the recommendation of
20 the Federal Public Defender organization ...); 18 U.S.C. § 3599(a)(1)(A) ("Notwithstanding any
21 other provision of law to the contrary, **in every criminal action in which a defendant is charged**
22 **with a crime which may be punishable by death**, a defendant who is unable to obtain adequate
23 representation or investigative, expert, or other reasonably necessary services ... before judgment ...
24 shall be entitled to the appointment of one or more attorneys ... in accordance with subsections (b)
25 through (f.)") (emphasis supplied); 18 U.S.C. § 3559(b) ("If the appointment is made before
26 judgment, at least one attorney so appointed must have been admitted to practice in the court in
27 which the prosecution is to be tried for not less than five years, and must have had not less than three

1 years of experience in the actual trial of felony prosecutions in that court.”); & 18 U.S.C. § 3599(d)
 2 (emphasis added) (“With respect to subsections (b) and (c), the court, for good cause, may appoint
 3 another attorney whose background, knowledge, or experience would otherwise enable him or her
 4 to properly represent the defendant, **with due consideration to the seriousness of the possible**
 5 **penalty and the unique and complex nature of the litigation.**”) (emphasis added). Accordingly,
 6 the governing statutory scheme expressly recognizes “the unique and complex nature of the
 7 litigation” in potential federal death penalty cases. *Id.*

8 Federal death penalty procedure is based on the Federal Death Penalty Act of 1994, codified
 9 at Title 18 United States Code Section 3591 *et. seq.* All cases in which a defendant is charged, or
 10 could be charged, with an offense subject to the death penalty, are governed by the procedures
 11 outlined in Chapter 9, Sections 10.010 through 10.190 of the United States Attorney’s Manual,
 12 which mandates that the final decision about whether to seek or not seek the death penalty is made
 13 by the Attorney General (himself or herself), after consultation with the United States Attorney and
 14 the Capital Case Unit within the Department of Justice, and, with limited exceptions, after providing
 15 defense counsel the right to present facts, including mitigating factors, to the United States Attorney
 16 and the Capital Case Committee in any case in which the United States Attorney is considering
 17 whether to request approval to seek the death penalty. Indeed, no final decision to seek the death
 18 penalty shall be made if defense counsel has not been afforded the opportunity to present evidence
 19 and argument in mitigation. *USAM 9-10.120.* The procedures inherent in the DOJ federal death
 20 penalty protocol, based upon McDuffy’s counsel’s experience over 10 plus years of defending cases
 21 subject to those procedures, make any case which is subject to them unique and complex in the
 22 investigation of statutory and non-statutory aggravating and mitigating factors, and the filing of pre-
 23 authorization discovery and similar motions practice. Even if review by the Attorney General is
 24 made on an expedited bases – such as where all parties agree that the gateway step to establish the
 25 requisite mental intent for capital murder by proof beyond a reasonable doubt is lacking under 18
 26 U.S.C. § 3591(a)(2), or no statutory aggravating factor arguably exists under 18 U.S.C. §3592(c) –
 27 the nature of this review remains unique and complex.

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1 The time needed to complete the Department of Justice’s “death penalty protocol” is properly
2 excluded under the Speedy Trial Act. See *United States v. Murillo*, 288 F.3d 1126 (9th Cir. 2002)
3 (holding that the Department of Justice’s death penalty protocol is a “valid reason to grant an ends
4 of justice continuance” under 18 U.S.C. § 3161(h)(7)(B)). It is the experience of counsel that,
5 even in the most expeditious case, the time necessary to complete the “death penalty protocol” is
6 usually between 12-18 months in cases in which the decision is to “not seek” the death penalty. This
7 experience is based on actual time periods in five or more cases which counsel has been counsel of
8 record in the District of Nevada, either in Las Vegas or in Reno. For this reason, the parties jointly
9 request that the Court designate this case a complex case and issue an order approving the proposed
10 complex case schedule set forth below.

PROPOSED PREAUTHORIZATION COMPLEX CASE SCHEDULE

1. The Initial Pre-Authorization Discovery Phase.

13 The parties propose that the government shall have from until December 20, 2013 to disclose
14 and provide the following:

- a. all statements, documents, and objects, including audio and video recordings, required to be disclosed under Federal Criminal Rules of Procedure 16(a)(1)(A)-(F);
 - b. all search warrants, orders authorizing the interception of wire, oral or electronic communications, and supporting affidavits, that relate to evidence that may be offered at trial;
 - c. all police or investigative reports that relate to the charges in the Indictment, except for reports or memoranda of interviews of witnesses the government intends to call in its case in chief.

If the government intends to withhold the disclosure of items based upon assertions of privilege or work product or otherwise, it must provide notice to the defense of its intent to withhold disclosure and describe the nature of the item and the basis for withholding disclosure.

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2. Preauthorization Motions

- a. Preauthorization Motions, that is, all motions related to the Death Penalty Protocol, shall be filed on or before April 25, 2014.
 - b. Responses to Preauthorization Motions shall be filed on or by May 23, 2014.
 - c. Replies to Preauthorization Motions shall be filed on or by June 6, 2014.
 - d. Defendant Van McDuffie shall submit to the United States Attorney his Memorandum to Preauthorization on or by August 29, 2014
 - e. The United States Attorney shall meet with defense counsel regarding Preauthorization on or by October 3, 2014
 - f. The United States Attorney shall submit his recommendation concerning death penalty eligibility to the United States Department of Justice on or by October 31, 2014.

3. Post-Filing of Notice Of Intent Regarding The Death Penalty

14 The parties will file an amended complex case schedule setting forth the schedule for further
15 discovery and discovery motions, pretrial motions, expert disclosure, and related matters within two
16 weeks of the filing of the Notice of Intent regarding the death penalty in the district court.

4. Trial Date

18 The parties request that the trial date be set after the United States Attorney General makes
19 his decision whether to authorize the United States Attorney to seek or not seek the death penalty,
20 because the trial time necessary for trial of a federal capital case is dramatically different than the
21 time necessary for trial of a case where the defendant is subject to life imprisonment but not death
22 as the potential penalty.

5. Stipulations For Speedy Trial Purposes.

IT IS HEREBY STIPULATED AND AGREED, by and between Daniel G. Bodgen,
United States Attorney, and Megan Rachow, Assistant United States Attorney, counsel for the
United States of America, and Rene Valladares, Federal Public Defender, and Michael Kennedy,
Chief Assistant Federal Public Defender, that the trial currently set for Tuesday, January 7, 2014 at

1 9:00 a.m. should be vacated and continued to a date and time to be set following the filing of the
 2 Notice of Intent regarding the death penalty in the district court. The calendar call presently
 3 scheduled for Monday, December 30, 2013 at 1:00 p.m. should be vacated and continued to a date
 4 and time to be set in an amended complex case scheduling order following the filing of the Notice
 5 of Intent regarding the death penalty in the district court. The ends of justice served by the granting
 6 of a continuance outweigh the best interests of the public and the defendant in a January 7, 2014 jury
 7 trial in this complex case pursuant to 18 U.S.C. § 3161(h)(7)(A), 3161(h)(7)(B)(ii) &
 8 3161(h)(7)(B)(iv). First, this is a complex case as defined in 18 U.S.C. § 3161(h)(7)(B)(ii). Second,
 9 the parties agree that the continuance requested herein is necessary under the provisions of 18 U.S.C.
 10 §§ 3161(h)(7)(A) and (B)(I) and (iv) because failure to do so would deny government counsel, the
 11 the defendant and defense counsel reasonable time necessary for effective preparation, taking into
 12 account the exercise of due diligence and it would result in a miscarriage of justice. Third, the
 13 parties also agree that the continuance requested herein is necessary under the provisions of 18
 14 U.S.C. §§ 3161(h)(7)(A) and (B)(I) and (B)(iv) to provide continuity of counsel, as defense counsel
 15 has a trial scheduled to commence before this Court on January 7, 2014. The additional time
 16 requested is excluded in computing the time within which the trial of any offense must commence
 17 under the Speedy Trial Act pursuant to Title 18 United States Code Section 3161(h)(7)(A) because
 18 the ends of justice served by taking such action outweigh the best interests of the public and the
 19 defendants in a speedy trial. 18 U.S.C. §3161(h)(7)(A).

20 Dated this 12th day of November, 2013.

21 DANIEL G. BOGDEN
 22 United States Attorney

RENE VALLADARES
 Federal Public Defender

23 /s/ Megan Rachow
 24 MEGAN RACHOW
 Assistant United States Attorney
 Attorney for United States of America

25 /s/ Michael Kennedy
 26 MICHAEL J. KENNEDY
 Chief Assistant Federal Public Defender
 Attorney for Van McDuffy

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ORDER

Pursuant to LCR 16-1(a)(4) of the Local Rules of Practice for the District of Nevada and upon good cause shown, the Court hereby orders that this case is designated a complex case. The Court further adopts the schedule set forth in this stipulation and proposed order filed by the parties. The Court incorporates by reference the reasons set forth above and finds that this action continues to be a complex case under 18 U.S.C. § 3161(h)(7)(B)(ii).

7 The Court further finds that the ends of justice served by this continuance outweighs
8 the defendants' and public's best interests in a speedy trial under 18 U.S.C. § 3161(h)(7)(A); that the
9 continuance is necessary because the failure to grant this continuance would deny counsel for the
10 Defendant the reasonable time necessary for effective preparation, taking into account the exercise
11 of due diligence under 18 U.S.C. § 3161(h)(7)(B)(iv); that the continuance will provide continuity
12 of counsel to the government and the defendant; and that the failure to grant the continuance
13 requested would result in a miscarriage of justice under 18 U.S.C. § 3161(h)(7)(B)(I). IT IS
14 HEREBY ORDERED that the time from the filing of the Proposed Complex Case Schedule through
15 the time until the filing of the Notice of Intent regarding the death penalty is excluded from the time
16 within which trial must commence under 18 U.S.C. §§ 3161(h)(7)(A) and (B)(I), (ii), and (iv). IT
17 IS FURTHER ORDERED that the schedules for filing pretrial motions and other filings dates set
18 forth in this Proposed Complex Case Schedule are hereby adopted and incorporated as part of this
19 Order. IT IS FURTHER ORDERED that the jury trial presently scheduled for January 7, 2014, at
20 9:00 a.m. is vacated and continued to a date to be set following the filing of the Notice of Intent
21 regarding the death penalty and that the calendar call presently scheduled for December 30, 2013 at
22 1:00 p.m. is also vacated and continued to a date to be set following the filing of the Notice of Intent
23 regarding the death penalty.

IT IS SO ORDERED.

DATED this 13th day of November , 2013

of November , 2013

UNITED STATES DISTRICT JUDGE
MIRANDA M. DU